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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-769

ROBERT M. KNUTH, et al., Petitioners,

v.

ERIE-CRAWFORD DAIRY COOPERATIVE ASSOCIATION, et al., Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 463 F.2d 470. The opinion of the District Court is reported at 326 F.Supp. 48.

JURISDICTION

The opinion and judgment of the Court of Appeals was filed on June 28, 1972; rehearing was denied on July 28, 1972. By order of this Court dated October 11, 1972 the time for filing a petition for a writ of certiorari was extended to November 25, 1972. The jurisdiction of this Court is invoked by petitioners under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutory provisions involved are the Sherman Act, 15 U.S.C. §1; the Clayton Act, 15 U.S.C. §15; the Milk Marketing Law, Act of April 28, 1937, P.L. 417, Pa. Stat. Ann. Tit. 31, §§700j-101 *et seq.* (1958); and the Act of March 27, 1713, 1 Sm. L. 76, Pa. Stat. Ann. Tit. 12, §31 (1953).

QUESTIONS PRESENTED

1. Did the Court of Appeals properly affirm the direction of a verdict in favor of defendants on plaintiffs' claim under the Sherman Act where there was no evidence of price fixing, no evidence of a contract, combination or conspiracy in restraint of trade in interstate commerce and no evidence that plaintiffs were injured in their business or property as a result of anything forbidden in the antitrust laws?

2. Did the Court of Appeals err in reversing a jury verdict for plaintiffs on their state law claim sounding in conversion where it found that plaintiffs had failed to establish any basis for relief?

3. Did the Court of Appeals properly affirm the entry of judgment N.O.V. as to all events occurring more than six years before plaintiffs' claim for conversion was pleaded where it found that there was no evidence of affirmative acts by defendants which would toll the statute of limitations under applicable Pennsylvania law?

STATEMENT[1]

Erie-Crawford Dairy Cooperative Association (the "Cooperative") is a non-profit agricultural cooperative existing under the laws of Pennsylvania; its members were dairy farmers located in the western Pennsylvania milk shed. From 1957 through 1965, the Cooperative sold milk which its farmer members produced, acting pursuant to a Marketing Agreement under which the Cooperative was a consignee agent with power to sell the milk at what "the Board of Directors shall deem to be the best advantage of the Producer" (Pet. App. 380a).[2]

From 1957 through 1965, the market in which the Cooperative operated was regulated by the Pennsylvania Milk Control Commission (the "PMCC") acting pursuant to the Milk Marketing Law. The PMCC specified minimum wholesale prices for milk received by handlers at Pennsylvania plants from Pennsylvania producers and minimum retail prices at which handlers were to resell milk to the consuming public. Although all milk sold at wholesale was required to meet the same standards of quality and purity, milk was categorized by the PMCC as Class I or fluid milk, and as non-fluid or manufacturing milk, depending in each instance upon the use

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1. The material facts are largely undisputed, and many were made part of a "Statement of Undisputed Facts" (Pet. App. 418a-429a). The facts here set forth are drawn from that Statement unless otherwise indicated. "Pet. App." refers to the Appendix for Appellant filed in the Court of Appeals. "Res. App." refers to the Joint Appendix for Appellees filed in that court.

2. In the dairy industry, farmers are called producers, and dairy companies or dealers are generally called handlers.

to which such milk was put.[3] The PMCC price schedule for Class I milk was substantially higher than the schedules established for the several classes of non-fluid milk (Res. App. 145b, 185b).

The jurisdiction of the PMCC was limited to intrastate commerce. Its price controls did not affect milk shipped into the state from outside Pennsylvania.[4] During this period the PMCC set a price for Class I milk which was substantially higher than the price of milk available from Ohio, New York and other states; the PMCC price for non-fluid milk was significantly lower than the price of out-of-state fluid milk.

Prior to and during the period in question milk production throughout the northeastern United States increased substantially. (Res. App. 760b-767b, 995b). In addition, improvements in refrigeration and transportation techniques largely eroded the previously localized nature of the dairy industry, permitting milk to be shipped routinely hundreds of miles (Res. App. 767b-771b). Consequently, during the pertinent period increasing quantities of out-of-state milk were available for shipment to Pennsylvania handlers at prices substantially below the PMCC Class I price.

Faced with this competitive situation and charged with obtaining the best price available for its members'

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3. Class I milk is used for bottled drinking milk, skim milk and buttermilk. Manufactured milk is used for fluid cream, ice cream mix, cottage cheese and sour cream (Class II); butter, cheese and skim milk powder (Class III); and evaporated milk (Class IV).

4. See *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964).

milk, the Cooperative agreed at different times with various individual handlers to adjust the price of its milk downward by various methods in order to bring that price into line with the price obtainable by those handlers from competitive sources. These price adjustments differed in amount for different customers and were calculated by several different formulae over different periods of time. In each case the amount of the adjustment was the smallest concession which the Cooperative's responsible officers deemed necessary to retain the handler's patronage. The adjustments were effected by means of rebate checks returned to the handler after an initial payment to the Cooperative of the full PMCC price.[5] As a result of these adjustments, the Cooperative received prices for its Class I milk which were less than the PMCC Class I price but significantly in excess of the PMCC price for non-fluid classes.

This lawsuit challenges the legality of the Cooperative's response to the conflict between the PMCC price controls and the competitive realities of the Western Pennsylvania milk industry. The action was brought on December 8, 1965 as a spurious class action by Robert M. Knuth, a former member of the Cooperative. The complaint alleged violations of Sections 1 and 2 of the Sherman Act and Section 2a of the Robinson-

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5. At trial defendants offered to prove that the PMCC and its agents knew of the rebating practice and regarded the initial receipt by the Cooperative of the full PMCC price as compliance with the Milk Marketing Law. This evidence was excluded by the trial court; the Court of Appeals held that such evidence was relevant to the Commission's interpretation of its price orders and was admissible.

Patman Act; as amended on May 31, 1966 the complaint charged a conversion under Pennsylvania law.[6] Named as defendants were the Cooperative, certain of its present or former directors, officers and employees, and twelve dairy companies each of which was a customer of the Cooperative.

After extensive pretrial proceedings the District Court granted defendants' Rule 12 motion, and the Court of Appeals reversed. 395 F.2d 420 (3rd Cir. 1968). Upon remand the District Court determined that the suit could be maintained as a class action,[7] and trial was had from September 14 to October 14, 1970 on the issue of liability. At the close of plaintiffs' case, the court directed a verdict in favor of all defendants on the remaining Sherman Act claim. Following a jury verdict for plaintiffs on the conversion claim the lower court granted defendants' motions for judgment N.O.V. with regard to the statute of limitations on the conversion claim, entering judgment in favor of all defendants as to all events prior to May 31, 1960.

The Court of Appeals allowed interlocutory cross appeals pursuant to 28 U.S.C. §1292(b). That Court affirmed the entry of a directed verdict on the Sherman Act claim and the entry of judgment N.O.V. as to the statute of limitations; it reversed the judgment for

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6. Prior to trial plaintiffs withdrew Count II of the Complaint containing the Robinson-Patman Act claim and abandoned their allegation of monopolization under Section 2 of the Sherman Act.

7. Notice was given to approximately 1200 members of the Cooperative pursuant to Rule 23, Fed. R. Civ. P; at the time of trial the class consisted of some 290 plaintiffs.

plaintiffs on the conversion count, and pursuant to Rule 50(d), Fed. R. Civ. P., remanded the matter to the trial court to afford plaintiffs an opportunity to present a motion for new trial.[8]

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8. The District Court also granted the motion of the individual defendants (save the defendant Howard Yost) for judgment N.O.V. Its decision in this particular was reversed by the Court of Appeals. In addition, both lower courts rejected plaintiffs' contention that damages could be recovered for or on behalf of those potential members of the plaintiff class who had elected not to participate in the action.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. The District Court entered a directed verdict on the Sherman Act claim based upon several independently sufficient grounds. Specifically the court found that there had been no proof of price fixing or of any restraint upon interstate commerce; no evidence of a conspiracy or of conscious parallelism; no proof that the flow of milk from outside Pennsylvania had been hindered by the price adjustments; and no evidence that plaintiffs were harmed by the alleged violation of the Sherman Act. Similarly, the Court of Appeals found that there was no *per se* violation of Section 1 of the Sherman Act; no conspiracy and no conscious parallelism; and no restraint on interstate commerce.[9]

Petitioner's sole contention is that there was adequate proof of a "combination" or "conspiracy". Given the several bases of the lower courts' decisions, a holding by this Court that such proof was present would not affect their disposition of the case.

Moreover, there was in fact no evidence of a conspiracy or combination within the meaning of Section 1. Unlike *Albrecht v. The Herald Company,* 390 U.S. 145 (1968) in which individual contracts were entered into for the purpose of enforcing resale price restric-

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9. It is implicit in that Court's treatment of the conversion claim that it did not believe plaintiffs to have been "persons injured in their business or property" by the alleged violation. "[T]here is no evidence in the plaintiff's case that this conversion [the rebates which were the basis of the anti-trust claim] caused any damage." 463 F.2d 470, 478 (3rd Cir. 1972); Appendix A to Petition, p. 16a.

tions as against the plaintiff, the individual sales contracts between the Cooperative and its handler customers had no such anti-competitive effect but only set the price as between a buyer and a seller at which sales of milk took place. Moreover, those sales were at the best available price and the sales contracts operated to the economic advantage of the Cooperative's members; it is part and parcel of the Court of Appeals' decision that there was no evidence to support a contrary conclusion.

Moreover, even if it were to be assumed *arguendo* that the price adjustments were illegal under the Milk Marketing Law, a violation of the Sherman Act would not be established. The illegality of an action under state law has no bearing upon an alleged violation of the antitrust laws where there is no adverse effect on interstate commerce. See, *e.g., Hunt v. Crumboch,* 325 U.S. 821 (1945) and *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 512 (1940).

Secondly, there was no evidence of conscious parallelism. The sales contracts between the Cooperative and the handlers were individually negotiated: the terms of such contracts — the amounts of the adjustments given, the formulae by which they were calculated and the periods of time which they covered — varied from case to case, and each handler bargained with the Cooperative for its own best advantage without knowledge of the arrangement made by any other handler.[10] The

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10. Petitioners' citation to one instance in which an employee of a defendant handler stated that he "assumed" that other handlers received some adjustments from the Cooperative falls far short of a showing of consciously parallel action.

conduct of the handlers was neither conscious nor parallel and does not permit an inference of conspiracy.

Finally, petitioners' reliance upon the "wheel conspiracy" theory of *Blumenthal v. United States*, 332 U.S. 539 (1947) is misplaced. In *Blumenthal* each individual coventurer had a role in a single pattern of action; each was a necessary party to the accomplishment of an overall objective. In the present case, the distinct arrangements between the Cooperative and the handlers were mutually independent. In dealing with the Cooperative each handler sought its own competitive advantage; it did not engage in a joint enterprise with its competitors.[11]

Finally, the decision of the Court of Appeals is not in conflict with the case of *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679 (8th Cir. 1966). The rebates found to constitute price fixing "under all the circumstances" of the *Bergjans* case were but one part of an attempt to damage horizontal competitors (*i.e.* wholesalers) through a conspiracy with a number of retail customers involving resale price maintenance. Thus, *Bergjans* involved vertical price fixing by conspiratorial agreements while the present case in which resale prices were established by the PMCC and maintained by all handlers completely lacks those elements.

2. Petitioners contend that the Court of Appeals violated the principle of Rule 15(b), Fed. R. Civ. P.,

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11. Petitioners suggest that the sales contracts served the common purpose of avoiding the need to import out-of-state milk or of preventing the formulation of a federal marketing order. Both suggestions are wholly without support in the record and wrong in fact, and the latter argument is here raised for the first time.

when it reversed a jury verdict for plaintiffs because of their failure to prove a conversion, notwithstanding the asserted fact that the proof would have justified recovery under a breach of contract theory. That contention wholly distorts the basis of the court's decision.

Far from finding that plaintiffs had proved but not pleaded a valid claim, the court held that plaintiffs had failed to establish a conversion and had offered no proof pertinent to the only theory upon which recovery might have been possible. Acting upon a liberal interpretation of Rule 50(d), Fed. R. Civ. P., the court remanded the case to allow plaintiffs to file a new trial motion, notwithstanding its expressed skepticism that proof of this alternative theory was available to plaintiffs and its view that the proof actually offered at trial suggested that no recovery on that theory could be established. 463 F. 2d 470, 480 (3rd Cir. 1972); Appendix A to Petition, p. 19a. Thus, the Court of Appeals actually outlined for plaintiffs a possible basis for recovery and allowed them a second opportunity to present their case to the District Court. Its holding is not remotely inconsistent with the cases cited by petitioners.

The issues presented by the adjudication of plaintiffs' claim for conversion are principally factual in nature and of little importance beyond the present case. Accordingly, there is no significant question of law for this Court to consider.

3. Petitioners' claim for conversion was governed by Pennsylvania law. The applicable statute of limitations would bar all claims for conversion for the period prior to May 31, 1960. Act of March 27, 1713, 1 Sm. L. 76, Pa. Stat. Ann. Tit. 12 §31 (1953). Petitioners contend

that the statute was tolled but cite no affirmative actions by defendants or any of them to conceal the rebating practices in question. The Court of Appeals held that absent such affirmative actions the statute is not tolled; that holding is a correct application of Pennsylvania law. *Walters v. Ditzler,* 424 Pa. 445, 449-50, 277 A.2d 833, 835 (1967) and *Barr v. Luckenbill,* 351 Pa. 508, 41 A.2d 627 (1945). The issue is not an important state law question the decision of the Court of Appeals was correct, and no useful purpose would be served by this Court's review of the matter.

CONCLUSION

The questions presented have been correctly decided by the courts below. No purpose would be served by this Court's exercise of its discretion to review them.

The petition for certiorari should be denied.

Respectfully submitted,

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